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REPLY TO WRITER

April 21, 1998

Office of Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: **New Jersey Division of Ratepayer Advocate Petition for Expedited Declaratory Ruling
CC Docket No. 96-45
DA 98-608**

Dear Sir:

Enclosed please find a corrected copy of Comments on behalf of New Jersey Cable Telecommunications Association in support of the Petition for Expedited Declaratory Ruling which were filed yesterday in the above referenced matter.

These typographical errors and corrections are as follows:

1. Page 8 - Line 12 - "\$180" should be "\$108"
2. Page 9 - Line 1 - "Federal Universal Service Fund" should be "federal USF"
3. Page 9 - Line 18 - "20% from . . ." should be "20% of . . ."
4. Page 10 - Line 1 - "preclude, an competition" should be "preclude competition."

Copies of the corrected version are being sent to the New Jersey Board of Public Utilities, the Division of Ratepayer Advocate and all participants in the LEC Proceeding, which is defined in the Comments. We apologize for any inconvenience this may have caused.

Very truly yours,

MEYNER AND LANDIS



Francis R. Perkins
Attorneys for
New Jersey Cable Telecommunications
Association

FRP:mm
Enclosure

cc: New Jersey Board of Public Utilities
Division of Ratepayer Advocate
LEC Proceeding Service List

041
THE

*I/M/O Bell Atlantic-New Jersey, Inc's Petition for Board Verification of
Compliance with Section 271 of the Telecommunications Act of 1996
BPU Docket No. TO97030166*

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	DA 98-608
Fourth Order on Reconsideration)	

**COMMENTS OF
THE NEW JERSEY CABLE TELECOMMUNICATIONS ASSOCIATION
IN SUPPORT OF PETITION OF
NEW JERSEY DIVISION OF RATEPAYER ADVOCATE
FOR EXPEDITED DECLARATORY RULING**

MEYNER AND LANDIS
Francis R. Perkins
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April 20, 1998

CORRECTED VERSION

INTRODUCTION

On May 8, 1997, the Federal Communications Commission (Commission) released a *Report and Order* on Universal Service (*Order*).¹ In the *Order*, the Commission determined that service providers are required to offer schools and libraries services eligible for discounts at prices no higher than the lowest corresponding price the provider charges to similarly situated non-residential customers for similar services.² On December 30, 1997, the Commission released its *Fourth Order on Reconsideration* reaffirming its previous ruling in the *Order* “that special regulatory subsidies need not be considered in determining the lowest corresponding price” and “that each such situation should be examined on a case-by-case basis to determine whether the rate is a special regulatory subsidy or is generally available to the public.”³

On March 18, 1998, the New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate) submitted a Petition for Expedited Declaratory Ruling (Petition) to the Commission, seeking a ruling that:

1) certain discounted rates for services provided by Bell Atlantic-New Jersey (BA-NJ) to schools and libraries under its Access New Jersey program are not a “special regulatory subsidy,” pursuant to the *Fourth Order on Reconsideration*, and that such rates constitute

¹ Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (rel. May 8, 1997) (*Order*).

² *Order*, 12 FCC Rcd at 9031-9032 para. 484.

³ Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72 at para. 141 (rel. Dec. 30, 1997).

the lowest corresponding price for purposes of calculating BA-NJ's reimbursement from the federal universal service fund;

2) the discounted rates offered by BA-NJ to schools and libraries under its Access New Jersey program do not preclude the schools and libraries of New Jersey from also obtaining benefits from the federal universal service fund; and

3) BA-NJ's plan to seek reimbursement from the federal universal service fund for the difference between discounted rates and tariff rates for services supplied to schools and libraries is contradictory to the Commission's ruling in the *Fourth Order on Reconsideration*.

On March 30, 1998, the Commission released a Public Notice in this matter seeking comment from interested parties, and directing that such comments be filed with the Commission on or before April 20, 1998, and that reply comments be filed on or before May 5, 1998, in accordance with the procedures set forth therein.

The New Jersey Cable Telecommunications Association (Association) (formerly known as the New Jersey Cable Television Association), is a trade association made up of the vast majority of the cable television operators operating cable television systems in the State of New Jersey. More than 2.2 million households in New Jersey are served with cable television service through almost 35,000 miles of plant, in just about every municipality in the State. The cable television industry in New Jersey is the most ubiquitous potential source of facilities-based competition to the incumbent local exchange carrier - BA-NJ.

The cable television industry in New Jersey is concerned that consumers be permitted to take full advantage of meaningful competition for the full range of telecommunications services - video, data and voice - and that as a result of regulatory action, either intentional or otherwise, does not

find itself competing against unfair advantages granted to BA-NJ.

Accordingly, the Association has actively participated in proceedings before the New Jersey Board of Public Utilities (NJBPU) concerning the establishment of an alternative form of regulation for BA-NJ⁴ and in which its program known as Opportunity New Jersey (ONJ) was approved. The Association participated as a full party in that proceeding, presenting witnesses and cross-examining those presented by other parties.

The Association subsequently participated as a party in proceedings before the NJBPU examining into the establishment of competition for local exchange competition (LEC Proceeding)⁵, presenting testimony, cross-examining witnesses of others and briefing selected issues.

Should the relief sought by Ratepayer Advocate in its Petition not be granted, the Association is concerned that the competitive disadvantage to all other potential suppliers of local exchange services resulting thereby will be such as to foreclose competition for the services to schools and libraries concerned.

⁴ *In the Matter of the Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation*, Docket No. TO92030358, 143 PUR4th 297 (May 6, 1993). BA-NJ was formerly known as New Jersey Bell Telephone Company. The historical background for the proceeding is set out in the Petition at pp. 4 and 5.

⁵ *In Re: Notice of Pre-proposal Notice of Investigation Local Exchange Competition for Telecommunications Services*, Docket No. TX95120631

COMMENT

The Association is in accord with the position of Ratepayer Advocate as set out in its Petition. Ratepayer Advocate appropriately states the law and facts of this matter and properly concludes that the lowest corresponding rate against which the Universal Service Fund (USF) discount should apply is the so called "Access New Jersey"⁶ rate which resulted from the proceedings that established the Opportunity New Jersey (ONJ) plan.

The absurdity of BA-NJ's position should be apparent on its face, but is all the more striking upon the review of the testimony on cross-examination of Harold E. West, the BA-NJ witness who appeared before the NJBPU in the LEC Proceeding to support its scheme.

The cross examination of Mr. West by attorneys for AT&T, MCI, the Association, and Ratepayer Advocate on the morning of September 18, 1997⁷, centered around BA-NJ's claim that it is entitled to reimbursement from the federal USF for ONJ discounts from its so-called "Tariff Rate." As can be seen, BA-NJ's claim, if implemented, would lead to rather bizarre circumstances.

The basis for BA-NJ's claim is the language of a stipulation of resolution (Stipulation) entered into among the NJBPU Staff, the Ratepayer Advocate, and BA-NJ on April 18, 1997, (T 43, 91, 142) which was approved by the NJBPU in its Order Approving Stipulation (ONJ Stipulation Order) issued on June 10, 1997. The Stipulation, which is attached to the Petition as Attachment 1, and obviously entered into prior the Commission issuing the *Order* on May 8, 1997, provides at page 6 :

⁶ The name applies to rates available to New Jersey schools and libraries under BA-NJ's ONJ plan.

⁷ The transcript of the cross examination of Mr. West during the September 18, 1997 hearing in the LEC Proceeding is included as an enclosure with these Comments for the convenience to the Commission. Page references are denominated in the form "T 18," where the reference would be to page 18, for example.

If a State or Federal Universal Service policy is established that provides discounts to schools and libraries for services listed in Schedule A [of the Stipulation], schools and libraries will be able to obtain whichever discount is greater. Nothing in this agreement is intended to prohibit BA-NJ from seeking reimbursement from the Universal Service Fund for the discounts to schools & libraries described herein. Any discount agreed upon in this Stipulation shall not preclude the Ratepayer Advocate from arguing that an additional discount above that provided for in Section A (2) herein should be funded out of the Universal Service Fund and be available to schools & libraries.

All cross-examiners used the SMDS 56 kbps data service listed on Schedule A of the Stipulation as the basis of their hypothetical questions concerning the mechanics of the implementation of that which Mr. West claimed BA-NJ is entitled under the *Fourth Order on Reconsideration* and the Stipulation. As can be seen, it provides a \$225 Tariff Rate and a \$100 Proposed Education Rate, for a Percent Discount of 56%. AT&T's attorney asked if the \$125 savings per school under the ONJ rate would be counted toward the "\$50 million in savings to schools and libraries from aggressively discounted services" referred at page 2 of the Stipulation (T 18). Mr. West responded:

Right. That would be the savings to the school and that would be the amount that counts toward the \$50 million and, that would also be the amount that Bell Atlantic reserved the right to recover from the Federal Universal Service Fund.

Further, Mr. West said that, as he understands the process, any school would have the ability to alternatively select from the ONJ discount or the discount from the USF. He says: "There are two sets of discounts that co-exist as alternatives to the schools and libraries" (T 21). He at first conceded that there is no document of which he is aware that requires a school to make such a selection (T 48), but later pointed to the first sentence of the language appearing at page 6 of the Stipulation, quoted above, as a recognition of the alternative discount approach available to schools and libraries (T 142).

He said that the “post-discount” rate (as distinguished from the “Tariff Rate”) would apply as the basis for the wholesale discount to the sale to a reseller of a service which is subject to the ONJ discount (T 29). But, he then said that it is the Tariff Rate which should be the basis for the discount for which the school is eligible (T 30). When asked concerning the language at Paragraph 473 of the *Order* regarding the pre-discount price to be used to determine the discount, Mr. West said that it should be the Tariff Rate, notwithstanding that the *Order* provides that the pre-discount price is the total amount that the carrier will receive for the services it sells to schools and libraries: the sum of the discounted price paid by the schools or library and the discount amount that the carrier can recover from the universal service mechanism for providing such service (T 32).

Counsel for each of the parties lead Mr. West through examples of how the fund reimbursement would work for a particular school using BA-NJ’s theory, (e.g., T 33, 36). He reiterated that it is BA-NJ’s position that the choice of a discount is an “either/or” circumstance (T 47).

Mr. West was asked what a school would tell the USF administrator is the price of the SMDS service for which it is paying \$100, and he answered that the school would tell the administrator that the pre-discount rate is \$225 (T 52). He was then presented with the language of Paragraph 484 of the *Order*, which provides that the Commission will “require a carrier to offer services to eligible schools and libraries at prices no higher than the lowest price it charges to similarly situated non-residential customers for similar services (hereinafter ‘lowest corresponding price’)” (T 56). He asserted that BA-NJ’s position is that the Schedule A post-discount price is not equivalent to what the Commission refers to as the lowest corresponding price (T 57).

Mr. West characterized the ONJ discount plan as “very much a State Plan with a tieback to

the Federal Plan” (T 58). He was asked if such a position were inconsistent with Paragraph 527 of the *Order*, which states “[The Commission] notes that states are free to establish their own discount program under state funded programs, but such programs would not receive federal universal service support.” He said that it is BA-NJ’s position that BA-NJ still has the right to seek reimbursement under the federal *Order* for Schedule A rates (T 62, 63).

Mr. West confirmed that in order to be eligible for a federal discount, schools or libraries must go through what is described as the federally required bidding process (T 77). Mr. West was asked whether the “bid price” of BA-NJ would be the \$225 Tariff Rate, or the \$100 post-discount rate. Mr. West said that the “bid price” would be the \$225, ***but that the school administrator would have to know that the price would really be the \$100.*** (T 78 - T 84).

Questioning by counsel for the Association (T 87 - T 103) assumes a hypothetical which considers just how a school district would comply with the public bidding laws applicable to school districts, and accept a nominal “bid” of \$225 from BA-NJ as being lower than a bid of lesser amount from a competitor provider, but greater than the \$100 he says BA-NJ would really charge. Further, the hypothetical considers the concern conceivably raised by a school board attorney that certifying to the USF administrator that the price from which a discount should apply is higher than the price actually being paid might constitute a fraud by the school district. Mr. West said that everyone should know that is not the real price. Mr. West concludes that is “the consequence of having alternative discounts in the marketplace and certainly the funding administrator is going to be aware of such a situation” (T 102). Mr. West did not say how the administrator is going to be aware of the “such a situation,” however.

Under re-direct examination by BA-NJ counsel, the witness noted that there was concern that

payment to the Universal Service Fund from New Jersey sources, which he estimated to be \$80 Million, would exceed return to New Jersey by some \$40 Million (T 154). He said that it is in the best interests of New Jersey for its citizens, “corporate or otherwise” to recover as much as possible from the federal USF (T 155).

BA-NJ, in its letter of February 8, 1998, to the NJBPU, addressing the *Fourth Order on Reconsideration*, attached to the Petition as Attachment 4, argues that it would be able to obtain reimbursement for “that portion of the discount to which the school or library is entitled from the Federal Universal Service Fund⁸.” BA-NJ goes on to posit an example of a service, the tariff price for which is \$360, the Access New Jersey price is \$180, and the federal universal service discount for the school or library in question is 20%. BA-NJ then argues that the school or library would pay BA-NJ \$180 (the Access New Jersey price), and the federal USF would reimburse BA-NJ 20% of the tariff price of \$360, or \$72. BA-NJ claims that it would “absorb” the remaining \$108. The analysis is consistent with the testimony of Witness West in response to questions on cross-examination concerning the mechanics of the refund concerning the SMDS service hypothetical used by counsel.

The letter goes on:

As BA-NJ noted in the Universal Service Phase of the Generic Proceeding, New Jersey would be penalized financially -- in the form of reduced Federal Universal Service Fund revenues flowing into the State -- unless schools and libraries were entitled to Universal Service discounts from the prediscount price before state-supported discounts were applied. The Fourth Order confirms this calculus.⁹

It is apparent that BA-NJ is seeking, to the extent that it can, to finance its obligations under

⁸See Attachment 4 to Petition, pp. 3, 4

⁹Petition, Attachment 4, page 5.

the alternative form of regulation scheme with refunds from the federal universal service fund. While it may be the subject of another debate as to whether “New Jersey” is being “penalized financially,” if the Access New Jersey rate is used to establish the prediscount rate, it is a sure thing that if the Tariff Rate is used, the beneficiary will not be “New Jersey,” but, rather, will be BA-NJ. BA-NJ undertakes no obligation to do anything with the higher reimbursement it would receive from the use of the Tariff Rate as the prediscount rate than to enrich its own coffers. It does not seek to use the increased proceeds to reduce rates for schools and libraries even further.

The bid process, as BA-NJ envisions it, would require the reporting of bid prices to the USF administrator that do not reflect the true cost for the services to be obtained. If Mr. West’s proposition that whatever is “good for the goose is also good for the gander” (T 162) is valid, competing providers would also establish “tariff rates” which are at variance with the price a school or library would actually pay for a service, while being refunded more from the USF than if the actual price were used as the basis for the calculation of the discount.

If a competitor could not use its tariff rate against which to apply the USF discount, then a competitor would be at a significant disadvantage in competing for the provision of the service. Taking the SMDS service used in the cross-examination of Mr. West, for example, if a school were entitled to a 20% discount, it would opt for the \$100 dollar Access New Jersey rate, and BA-NJ would claim and receive a 20% of the \$225 Tariff Rate, or \$45. A competitor would have to meet the \$100 actual out-of-pocket cost to the school in order to have a hope for the business. At a 20% discount, the competitor would have to bid \$125, and would receive a \$25 reimbursement. BA-NJ could undercut the competitor by yet another \$20 below the Access New Jersey rate and be in the same net position as the competitor at the \$125 bid. Such a scenario would clearly inhibit, if not

effectively preclude competition for the provision of the service.

CONCLUSION

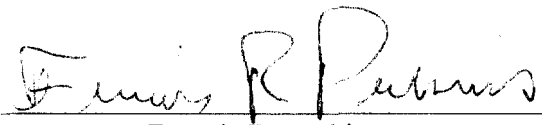
BA-NJ's scheme for reimbursement for Access New Jersey services based on its Tariff Rate would result in a meaningless and chaotic bidding process; would be an impediment to competition for the provision of those services by other entities; and, would result in an unwarranted subsidy to BA-NJ's Opportunity New Jersey obligations, without bringing federal USF monies "back to New Jersey."

The Commission should grant the relief sought by Ratepayer Advocate in its Petition. Should the Commission agree, however, that the appropriate prediscount rate for federal USF discounts is BA-NJ's Tariff Rate, it should ensure that the reimbursement funds inure to the benefit of New Jersey consumers, and not BA-NJ. Further, the Commission should make clear that a "tariff rate," rather than the actual price paid, offered by competitors should also be the "prediscount rate" for calculating the amount of any refund from the federal USF for services provided by them.

Respectfully submitted,

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MEYNER AND LANDIS

By: 
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April 20, 1998